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FILED

SEP 17 2001

BANKRUPTCY COURT
OAKLAND, CALIFORNIA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

TRI VALLEY GROWERS, a
California Cooperative
Association,

Debtor. /

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS of TRI VALLEY GROWERS,

Plaintiff,

vs.

HARRIS FARMS, INC., a California
corporation, et. al.,

Defendants. /

and consolidated action

No. 00-44089 J11
Adv. No. 01-4098 AJ
Adv. No. 01-4156 AJ

MEMORANDUM DECISION (MOTION FOR LEAVE TO INTERVENE)

A. Introduction

The Official Committee of Growers (the "Growers' Committee") has filed a motion seeking leave to intervene in this adversary proceeding. The motion is opposed by the Official Committee of Unsecured Creditors, the plaintiff herein (the "Creditors' Committee"), and by the U.S. Trustee, which appointed the Growers'

Memorandum Decision

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1 Committee. The court will deny the motion.

2 Tri Valley Growers, the above debtor ("Tri Valley"), is a
3 cooperative association organized to process and market fruits and
4 vegetables delivered by its member growers. Tri Valley filed its
5 chapter 11 petition herein on July 10, 2000.

6 The present adversary proceeding is a class action for
7 declaratory relief in which the Creditors' Committee seeks a
8 determination as to allowability and status of the creditor claims
9 that have been filed by numerous grower-members of Tri Valley.
10 Specifically, the complaint seeks a determination that the grower-
11 members: (a) are not entitled to producer's liens under California
12 Food and Agricultural Code § 54001 et. seq. because of their status
13 as members of a cooperative, and thus, that they are not holders of
14 secured claims against the estate herein, (b) that the grower
15 members' right to receive a dividend out of the estate in respect of
16 their unsecured claims is subject to certain restrictions in Tri
17 Valley's charter, and (c) that because of such restrictions, the
18 grower members do not have administrative priority claims arising
19 from their postpetition deliveries of products to Tri Valley.

20 The motion is governed by Fed. R. Civ. P. 24, which applies in
21 adversary proceedings via Fed. R. Bankr. P. 7024.

22 B. Intervention of Right

23 Fed. R. Civ. P. 24(a) provides:

24 (a) Upon timely application anyone shall be permitted to
25 intervene in an action: (1) when a statute of the United
26 States confers an unconditional right to intervene; or (2)
when the applicant claims an interest relating to the

1 property or transaction which is the subject of the action
2 and the applicant is so situated that the disposition of
3 the action may as a practical matter impair or impede the
4 applicant's ability to protect that interest, unless the
5 applicant's interest is adequately represented by existing
6 parties.

7 The Growers' Committee contends that it is entitled to intervene as
8 a matter of right under both subsections of Fed. R. Civ. P. 24(a).

9 As to Fed. R. Civ. P. 24(a)(1), the Growers' Committee argues
10 that Bankruptcy Code § 1109(b) is a statute that confers upon it the
11 unconditional right to intervene. Bankruptcy Code § 1109(b)
12 provides as follows:

13 (b) A party in interest, including the debtor, the
14 trustee, a creditors' committee, an equity security
15 holders' committee, a creditor, an equity security holder,
16 or any indenture trustee, may raise and may appear and be
17 heard on any issue in a case under this chapter.

18 In Matter of Marin Motor Oil, Inc., 689 F.2d 445 (3d Cir.
19 1982), the Third Circuit held that "case" within the meaning of
20 § 1109(b) included adversary proceedings, and thus, that creditors'
21 committees have an unqualified right to intervene in all proceedings
22 being litigated in a particular bankruptcy case. This holding, if
23 good law, would entitle the Growers' Committee to intervene herein
24 without regard to any of the circumstances present here that would
25 dictate against intervention.

26 In Fuel Oil Supply and Terminaling v. Gulf Oil Corp., 762 F.2d
1283 (5th Cir. 1985), however, the Fifth Circuit was faced with the
same issue, and reached the opposite conclusion, holding that
Bankruptcy Code § 1109(b) did not confer upon creditors' committees

1 the absolute right to intervene in adversary proceedings, and that
2 courts should consider the factors specified in Fed. R. Civ. P.
3 24(a)(2) when faced with a motion by a creditors' committee to
4 intervene in an adversary proceeding. See also In re Thompson, 965
5 F.2d 1136, 1142 n.8 (1st Cir. 1992).

6 In reaching its conclusion, the court in Fuel Oil noted that
7 "courts have been hesitant to find unconditional statutory rights of
8 intervention", and when they do, the right is generally conferred on
9 the United States or a regulatory commission. Fuel Oil, 762 F.2d at
10 1286. The court also stated that the applicable procedural rules
11 governing both intervention and the rights of creditors committees
12 to initiate adversary proceedings supported its conclusion. Id. at
13 1286-87.

14 This court finds Fuel Oil more persuasive than Marin. Indeed,
15 after it decided Marin, the Third Circuit revisited the issue in
16 Phar-Mor Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1233 (3d Cir.
17 1994), and discussed in depth the reasons why many courts rejected
18 its analysis in Marin, only to acknowledge that "internal operating
19 procedures barred [the Third Circuit] from overruling it." In Phar-
20 Mor, the Third Circuit noted:

21 The courts rejecting Marin have advanced three reasons why
22 Marin's interpretation of the scope of §1109(b) is
23 incorrect. First, Congress has consistently drawn a
24 distinction between bankruptcy "cases" and "adversary
25 proceedings" related to them in other parts of the
26 bankruptcy statutory scheme. Second, courts have
construed Rule 24(a)(1) narrowly; these courts have been
reluctant to interpret statutes to grant an unconditional
right to intervene to private parties. Third, Bankruptcy

1 Rule 7024 and its accompanying advisory committee note
2 indicate that Congress was aware of a distinction between
3 cases and adversary proceedings and that Congress intended
4 to differentiate between them in the context of
5 intervention.

6 According to the courts critical of Marin, these
7 legislative and judicial developments indicate that
8 Congress was aware of the distinction between adversary
9 proceedings and cases, and deliberately did not extend the
10 right to intervene to adversary proceedings. These courts
11 believe that Congress intended that motions to intervene
12 under § 1109(b) would be controlled by Rule 24(a)(2)
13 rather than Rule 24(a)(1).

14 Id. at 1232-33.

15 For the reasons stated in Fuel Oil and in Phar-Mor's discussion
16 of the reasons courts have declined to follow Marin, this court
17 holds that Bankruptcy Code § 1109(b) does not provide creditors'
18 committees with the absolute right to intervene in all adversary
19 proceedings.

20 The next issue, then, is whether Fed. R. Civ. P. 24(a)(2)
21 provides the Growers' Committee with the right to intervene. To
22 prevail, the Growers' Committee must show the following: (1) the
23 application must be timely; (2) the applicant must have a
24 "significantly protectable" interest relating to the transaction
25 that is the subject of the litigation; (3) the applicant must be so
26 situated that the disposition of the act as a practical matter will
impair or impede the applicant's ability to protect its interest;
and (4) the applicant's interest must be inadequately represented by

1 the parties before the court. See Northwest Forest Resource Council
2 v. Glicknuin, 82 F. 3d 825, 836 (9th Cir. 1996).

3 Here, the Growers' Committee cannot make such a showing. As to
4 the second factor, the Growers' Committee, as distinguished from the
5 growers who filed claims, does not have any property interests at
6 stake. See Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508,
7 1512 (11th Cir. 1996). See also Lujan v. Defenders of Wildlife, 504
8 U.S. 555, 560 n.1 (1992). As to the third factor, this court has
9 held that the Growers' Committee does not even have standing to bind
10 any grower-claimants as to the "allowance, disallowance, amount,
11 priority, or status (secured or unsecured) of their individual
12 claims," the very matters that are at issue herein. See Decision on
13 Motion to Dismiss, filed June 26, 2001 in Official Committee of
14 Growers v. Tri Valley Growers, Adv. Proc. 01-4076 AJ herein,
15 attachment, p.2.

16 As to the fourth factor, this court has found by its Amended
17 Order Approving Maintenance of Class Action; Findings of Fact and
18 Conclusions of Law, entered herein August 14 2001, that the growers
19 are adequately represented by the class representatives herein. See
20 paragraphs 9 - 12. The court has considered the applicable factors,
21 see, e.g., Blake v. Pallan, 554 F.2d 947, 954-55 (9th Cir. 1977),¹
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23 ¹In Blake, the Ninth Circuit stated that when evaluating the
24 adequacy of representation, the court should consider:
25 (1) whether the interests of the existing party and the
26 intervenor are sufficiently similar that the existing party would
undoubtedly make the same legal arguments as the intervenor;
(continued...)

1 and concluded that whatever interest the Growers' Committee has in
2 the outcome of this litigation will be adequately protected by the
3 class representatives, who, unlike the the Growers' Committee, are
4 the real parties in interest, the parties with money at stake, and
5 the parties with standing to litigate the issues that have been
6 raised.

7 The court therefore holds that the Growers' Committee is not
8 entitled to intervene pursuant to Fed. R. Civ. P. 24(a)(2). See,
9 e.g., In re Chalk Line Mfg., Inc., 184 B.R. 828, 833 (Bankr. N.D.
10 Ala. 1995), In re Heck's Properties, Inc., 151 B.R. 739, 749
11 (S.D.W.Va. 1992) (denying equity committee's motion to intervene in
12 action alleging injury to corporate debtor, because debtor in
13 possession's prosecution of action adequately protected
14 stockholders' interests); In re CVC Inc., 106 B.R. 478, 480 (Bankr.
15 N.D. Ohio 1989) (holding that no inadequate representation existed
16 justifying creditors' committee intervention under Rule 24(a)(2) in
17 debtor in possession's action against individual creditor).

18 C. Permissive Intervention

19 Fed. R. Civ. P. 24(b) provides, in relevant part:

20 (b) Upon timely application anyone may be permitted to
21 intervene in an action: (1) when a statute of the United
22 States confers a conditional right to intervene; or (2)

23 ¹(...continued)

24 (2) whether the existing party is capable and willing to make
25 such arguments, and (3) whether the intervenor would add some
26 necessary element not covered by the existing parties to the
proceedings.

1 when an applicant's claim or defense and the main action
2 have a question of law or fact in common. . . . In
3 exercising its discretion the court shall consider whether
4 the intervention will unduly delay or prejudice the
adjudication of the rights of the original parties.

5 A bankruptcy court has broad discretion to grant or deny
6 motions for permissive intervention. Orange County v. Air
7 California, 799 F.2d 535, 539 (9th Cir. 1986), cert. denied 480 U.S.
8 946 (1987). Even if the Growers' Committee could prove it meets all
9 of Rule 24(b)(2)'s threshold requirements, the Court retains the
10 discretion to deny permissive intervention. Donnelly v. Glickman,
11 159 F.3d 405, 412 (9th Cir. 1998) (citing Orange County, 799 F.2d at
12 539). In exercising its discretion, the Court may consider other
13 relevant factors.

14 These relevant factors include the nature and extent of the
15 intervenors' interest; their standing to raise relevant legal
16 issues; the legal position they seek to advance, and its probable
17 relation to the merits of the case; whether the intervenors'
18 interests are adequately represented by other parties; whether
19 intervention will prolong or unduly delay the litigation; and
20 whether parties seeking intervention will significantly contribute
21 to full development of the underlying factual issues in the suit and
22 to the just and equitable adjudication of the legal questions
23 presented. Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326,
24 1329 (9th Cir. 1977).

25 Here, the court's consideration of the relevant factors leads
26 it to conclude that intervention should be denied. The court has

1 already mentioned that the Growers' Committee lacks standing to bind
2 any claimants as to the allowance or status of their claims. It has
3 also noted that the grower-claimants are already and adequately
4 represented by the class representatives, and do not require an
5 additional representative, especially one that has suffered no
6 injury. The added expense to the estate also dictates against
7 intervention.

8 Moreover, the U.S. Trustee appointed the Growers' Committee to
9 negotiate a plan and "not . . . to engage in any litigation nor to
10 defend any litigation concerning its individual members."

11 Transcript of November 22, 2001 hearing at 34:24 - 35:10. The court
12 will deny the Growers' Committee's motion for permissive
13 intervention under Fed. R. Civ. P. 24(b).

14 D. Conclusion

15 For the above reasons, the court will issue its order denying
16 the motion of the Growers' Committee to intervene under Fed. R. Civ.
17 P. 24(a) and (b).

18 Dated: September 17, 2001

21 _____
22 Edward D. Jellen
23 United States Bankruptcy Judge
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25
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**United States Bankruptcy Court
Northern District of California**

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